United Nations A/CN.9/609

General Assembly

Distr.: General
4 May 2006

Original: English/Spanish

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Note by the Secretariat

Contents

		Page
I.	Introduction	2
II.	Comments received from Member States and international organizations	3
	A. Member States	3
	Guatemala	3
	Italy	5

V.06-53824 (E) 290506 290506

I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that priority items for the Working Group should be: the requirement of written form for the arbitration agreement contained in article 7 (2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law") and article II (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"),[1] as well as enforceability of interim measures of protection.[2]

2. The Working Group finalised its work on the draft legislative provisions regarding interim measures and the form of arbitration agreement as well as on the draft declaration regarding the interpretation of article II (2), and article VII (1), of the New York Convention at its forty-fourth session (New York, 23-27 January 2006). By a note verbale dated 21 March 2006, the Secretary-General transmitted the texts of the draft legislative provisions on interim measures and the form of arbitration agreement as well as the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention, as annexed to the report of the Working Group on that session (A/CN.9/592) to States and to intergovernmental and international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers. Short notes on each text were issued separately (A/CN.9/605 on the draft legislative provisions on interim measures, A/CN.9/606 on the draft legislative provisions on the form of arbitration agreement, A/CN.9/607 on the draft declaration regarding the interpretation of articles II (2), and VII (1), of the 1958 New York Convention).

3. The present document reproduces the first comments received by the Secretariat on draft legislative provisions on interim measures and the form of arbitration agreement as well as on the draft declaration regarding the interpretation of articles II (2) and VII (1) of the New York Convention. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments received from Member States and international organizations

A. Member States

Guatemala

[Original: Spanish]
[28 April 2006]

Comments from Guatemala on the amendments to the UNCITRAL Model Law on Arbitration

I have the honour to transmit below comments on the draft provisions to be included in the amendments to the UNCITRAL Model Law on Arbitration (the Model Law). It was my understanding that the comments should be as concrete as possible, and they are that. However, if the Permanent Mission considers that some comments should be more detailed, I stand ready to assist.

In the first place, it should be recognized that interim measures and preliminary orders have attracted particular interest and gained special significance as an area where progress could be made with arbitration regulations that offer greater possibilities to arbitrators and arbitral tribunals as regards the power to decree or prescribe such measures or orders. That is one of the main reasons why for the past two years or so work has been under way in Guatemala on a draft law, submitted by the Supreme Court, whose purpose it is to assign greater coercive powers to arbitrators as regards the capacity to decree or prescribe such measures.

It should be mentioned that this exercise has been criticized by the person who is preparing this report, on the grounds that it aims to give direct coercive powers to arbitrators, enabling them to decree such measures without any judicial support or help; in other words, it aims to confer "*jus imperium*" on arbitrators with regard to interim measures or anticipatory measures or preliminary orders. It would seem that the proposal prepared by the relevant working group during the forty-fourth session (held in New York from 3 to 27 January 2006) is not only more reasonable in that respect but also more in line with the overall contents of the Model Law.

That having been said, there follow detailed comments on the analysed text.

Article 17 (1)

The following wording is suggested: (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of any party, grant interim measures (it is suggested that the word A be replaced by ANY).

This semantic change creates a broader or more balanced impression of the situation for all parties to the arbitral process.

Article 17 (2)

No actual change in wording is suggested, but it is suggested that thought be given to the use of the word "laudo" [award] to denote the means by which an interim measure might be granted. Although the reason for using that word is clear,

being linked principally to the executive force of the word when used in a State's jurisdictional tribunals, in some jurisdictions it may give rise to confusion insofar as it refers to the final conclusion of legal proceedings ("laudo" is equivalent to "sentencia" [judgement], and in ordinary or jurisdictional proceedings interim measures are granted through preliminary orders or decisions). Perhaps the expression "laudo interino" [interim award] could be used, as, I believe, it is in other jurisdictions, and, if it were used, perhaps a definition of this type of "laudo" [award] could be added to the article of the Model Law containing the definitions.

If the use of the expression "laudo interino" [interim award] were accepted, where reference is made in Article 17 (2) to "a subsequent award" the expression "laudo definitivo" [final award] would have to be used in the subparagraph in question.

Article 17 bis

Subparagraph (1) (a)

It is suggested that, instead of the words "no resarcible" [not reparable], use be made of "no reversible" [irreversible] or "irreparable".

Subparagraph (1) (b)

It is suggested that this subparagraph be deleted. In the Guatemala jurisdiction it could be used as a means of impugning or discrediting the arbitrators on the grounds that they had advanced in some way or other an opinion about the claims of one of the parties. Perhaps it would be better simply to indicate, in this or some other provision of the Model Law amendment proposal, that the arbitrators shall decide on the measures in respect of which they are competent, or to establish a higher standard of care for the arbitrators as regards their decision whether or not to grant such measures.

Section 2

It is suggested that in the first line "a toda demanda" [to a request] be replaced by "a todo requerimiento" [the English version would probably not be affected]. If this change were acceptable, it would have to be made in other provisions as well—for example, in Article 17 ter. Similarly, it is suggested that in various articles of the proposal the word "demandante" in the phrase "demandante de una medida cautelar" [party requesting an interim measure] or "demandante de una orden preliminar" [party requesting a preliminary order]* be replaced by "solicitante" or "requirente".

* *Translator's note*: The phrase "demandante de una orden preliminar" does not appear to occur in A/CN.9/592.

Article 17 ter

As the term "Órdenes preliminares" [Preliminary orders] is not used in all jurisdictions in their laws relating to legal procedure,[1] perhaps, as with "medidas cautelares", a definition of that term should be included.

It would be useful to know more about the relationship, in the case in question, between preliminary orders and interim measures, in order to decide whether it is necessary to make further comments regarding this and other articles.

Further to the previous comment, the regulation relating to the recognition and enforcement of interim measures should be examined more thoroughly, as it would appear that these are thought of principally in the context of international arbitrations, whereas in some jurisdictions, such as that of Guatemala, the Model Law has been adopted as domestic legislation covering both international and national arbitrations. It will be necessary to determine whether the proposed regulation applies equally to national arbitrations. Finally, as regards the revised legal provisions relating to the form of the arbitral agreement there is only one comment, as follows.

Article 7 (3)

The following wording is suggested:

"An arbitration agreement shall be in writing if there exists any record or documentary evidence of its contents, regardless of whether the agreement or the contract of which it is a part was concluded orally, through the execution of certain legal documents or by some other means."

Italy

[Original: English]
[3 May 2006]

Comments on Draft legislative provisions on interim measures and preliminary orders (Annex I)

Under the present status of Italian law on arbitration, arbitrators are not granted the power to issue interim measures or preliminary orders. The Italian view of the matter is that such power ought to be reserved to the exclusive benefit of the Court of competent jurisdiction. This fundamental choice of the Italian legal system is not expected to change in the near or foreseeable future. Thus, the proposed new UNCITRAL rules on interim measures and preliminary orders are unlikely to be adopted, in whole or in part, by the Republic of Italy. This would be even more stringent for interim measures recognized *inaudita altera parte*. The Italian Delegation had already submitted in the past comments and proposals on the above, that are reiterated and recalled here.

Assuming however that, notwithstanding the above, the Commission may still find it useful to receive comments from an Italian perspective on such proposed new rules, the following comments are offered.

[1] In Guatemala at least, the term is not used in laws relating to civil and trade law procedure. Instead, the terms "medidas cautelares", "medida's preventivas" or "medidas de garantia"are used.

1. The entire Chapter IV bis (from Article 17 to Article 17 undecies) is drafted in a very detailed and analytical form and in a legal style that, it is submitted, is likely to be accepted without difficulties only by countries which belong to the common law tradition.

Adoption by countries, such as Italy, belonging to the civil law tradition would encounter less difficulties, if a more concise style were adopted and more reliance were placed on the traditional gap-filling function of national procedural rules governing in each country the exercise of summary jurisdiction on grounds of urgency.

2. It would be appropriate to make it clear (whether in the text of the Draft provisions or in an official Commentary or in the Guide to Enactment) that in Chapter IV bis the word "party" may only mean a "party to the arbitration agreement", not a third party whose position may be affected by the interim measure or the preliminary order, but whose consent to being subjected to the jurisdiction of the arbitral tribunal is lacking.

Article 17 quater (2) provides a good illustration of a provision whose legal certainty would benefit, it is submitted, from the insertion of the above suggested clarification.

3. In the light of the strong opposition that was voiced by a number of delegations within the Working Group against the opt-out formula which was ultimately selected in Article 17 (1) and Article 17 ter (1), the Commission may wish to reconsider the advisability of offering a final text, in which an opt-in formula may be added as an alternative solution.

Thus, as an alternative to "Unless otherwise agreed by the parties", the final text could also offer the possibility of choosing, as an opening statement of Article 17 (1) and Article 17 ter (1), the words "If so agreed by the parties" or any other equivalent wording.

Comments on Draft legislative provisions on the form of arbitration agreement (Annex II)

Annex II offers a new revised "long" text of Article 7 ("Definition and form of arbitration agreement") and an alternative "short" text ("Definition of arbitration agreement").

A preference is expressed for the "long" main proposal, whose underlying intent is to introduce an important distinction, deserving approval.

Concisely stated, the distinction is between the certainty of the parties' will to arbitrate and the certainty of the rules designed to govern the conduct of the arbitration proceedings.

Whilst in many national legal systems the written form of the arbitration agreement is still required for the purposes of achieving the first type of certainty (i.e., the certainty of the will to arbitrate), the proposed revision of Article 7 (long text) intends to achieve a radical change of perspective, by shifting the focus on the second type of certainty (i.e., by aiming at securing the certainty of the rules designed to govern the conduct of the arbitration proceedings).

In substance, the proposed revision of Article 7 (long text) liberalizes the manner in which the parties may express their will or consent to arbitrate (this may

be done even "orally, by conduct or by other means"), whilst the form requirement is still imposed for the different purpose of making sure that there is a "recorded" certainty of the rules, by which the arbitration will be conducted.

The key provision is Article 7 (3), in respect of which the Commission is called to assess whether the underlying intent of achieving certainty of the arbitration rules would be better served by defining the form requirement by reference to a record of the "terms" (first option in square brackets) or by reference to a record of the "content" (second option in square brackets) of the arbitration agreement.

A strong preference is expressed herein for the use of the word "content" as opposed to "terms", since "content" appears to better describe the prescriptive internal substance of an agreement for which the law requires the use of an external form.

However, this is merely the indication of the preferable choice between "terms" and "content". The Commission may well wish to consider the advisability of adopting a different and more satisfactory wording of the entire Article 7 (3), provided always that the fundamental choice of prescribing the form requirement for the sole purpose of the certainty of the arbitration rules is preserved in its substance.

Comments on Draft declaration regarding the interpretation of article II, paragraph (2) and article IV, paragraph (1), of the New York Convention (Annex III)

A favourable opinion is expressed in support of this Draft declaration.

Although it may be difficult to assess in precise legal terms how effective, if adopted, the declaration may be in reducing the present lack of uniformity in the interpretation of the New York Convention, it would be unrealistic to assume that a different and more ambitious solution would have greater chances to succeed.

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 344-350 and 380.

[2] *Ibid.*, paras. 371-373 and 380.

United Nations A/CN.9/609/Add.1

General Assembly

Distr.: General
4 May 2006

English
Original: Chinese

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Addendum

Contents

		Page
II.	Comments received from Member States and international organizations	2
A.	Member States	2
2.	China	2

V.06-53831 (E) 060606 060606

II. Comments received from Member States and international organizations

A. Member States

2. China

[Original: Chinese]

[26 April 2006]

MC/DTL Administrative letter No.26[2006]

Comments in response to the relevant draft documents of Working Group II of the United Nations Commission on International Trade Law

The three draft documents prepared by Working Group II (Arbitration and Conciliation) and as forwarded by UNCITRAL have been duly received. After consideration, we hereby submit the following comments:

I. Revised Legislative Provisions on Interim Measures and Preliminary Orders

(I) General comments on the text as a whole

The present draft represents an extensive expansion of the provisions in Article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration regarding the power of the arbitral tribunal to order interim measures. The terms "interim measures" and "preliminary orders" are similar in meaning to "preservative measures" known in China's legal system, which include preservative measures towards property and preservative measures with regard to evidence. The Arbitration Law of China states in its Article 28 that "... If one of the parties applies for property preservation, the arbitration commission shall submit to a people's court the application of the party in accordance with the relevant provisions of the Civil Procedure Law"; and in its Article 46 that "... If the parties apply for such preservation, the arbitration commission shall submit the application to the basic-level people's court of the place where the evidence is located." In other words, the Chinese law has not accorded the arbitral tribunal the power to order preservative measures, nor the power to order interim measures or issue preliminary orders. In this connection, therefore, the present draft is in conflict with the relevant provisions of the Chinese civil procedure law and the arbitration law. There is no legal basis for courts in China to recognize and enforce interim measures and preliminary orders from foreign arbitral tribunals.

(II) Comments on specific provisions

Within the extent of our general views as above, we make the following suggestions for amendment of specific provisions:

1. For paragraph (1)(b), Article 17 bis—Conditions for granting interim measures in Annex I, Revised legislative provisions on interim measures and preliminary orders, it is suggested that subparagraph (b) "There is a reasonable possibility that the requesting party will succeed on the merits of the claim, ..." be deleted in its entirety, as it is no easy task to make an accurate prejudgement on the likelihood of success of the claim at the time of application for interim measures. Besides, who is going to determine such likelihood and how should it be determined remains a tough issue. It takes time to make such determinations. And interim measures are of such an urgent nature that does not allow for longer periods of time to decide on the possible existence of the likelihood of success. Delay in time will defeat the purpose of the provisions on interim measures.

2. For paragraph (5), Article 17 quater—Specific regime for preliminary orders, it is suggested that the clause "but shall not be subject to enforcement by a court" be deleted from the paragraph "A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court ..." for a preliminary order that is not subject to enforcement by a court will bring about no real effect.

3. For the second line in Article 17 quinquies—Modification, suspension, termination, it is suggested to insert the words "if it is justified" after "upon application of any party", since it is unacceptable for an application not to be justified.

4. For paragraph (1), Article 17 novies—Recognition and enforcement, it is suggested to delete the phrase "unless otherwise provided by the arbitral tribunal", since there should be no provision otherwise by the arbitral tribunal once it has issued an order for "interim measures". The phrase lends little room for reasonable understanding.

II. Revised legislative provisions on the form of arbitration agreement

(I) General comments on the text as a whole

The text is an attempt, in the light of technological developments, for revision by way of expanded understanding of the requirement for " writing" in Article 7 of the Model Law regarding the definition and form of an arbitration agreement. The Arbitration Law in effect in China contains similar requirements for arbitration agreements to be "in writing". With technological advancement, inter-personal communications and the conclusion of contracts are being done increasingly by verified means, which undoubtedly calls for a corresponding expansion in the interpretation of the requirement for "writing", hence the necessity to revise Article 7 of the Model Law. For this purpose, we prefer the first alternative text which describes in specific terms the forms of "writing" and lends itself to easier operation, while being consistent with the understanding of written forms of contracts in China's current practice.

(II) Comments on specific provisions

1. For paragraph (3), Article 7—Definition and form of arbitration agreement under (1) Revised draft article 7 in Annex II, Revised legislative provisions on the form of arbitration agreement, it is suggested to substitute in the second line the word "established" for the word "recorded", the reason being that "recorded" is narrower in its meaning than the word "established".

2. For Article 7— Definition of arbitration agreement under (2) Alternative proposal, the text is less than satisfactory and therefore is to be discarded.

III. Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention

The draft declaration is intended to express the desire that States would give at an earlier date their valid interpretation of the form requirements for arbitration agreements so as to keep pace with the development in the forms of writing in the modern society. The ultimate goal is to lead to recognition and enforcement of international commercial arbitration awards in various States to the greatest possible extent. The declaration is in correspondence with the revision and improvement of Article 7 of the Model Law. We find the current text of the declaration to be appropriate and, therefore, fully acceptable.

IV. Expressions in the Chinese and English texts

With regard to individual cases of inconsistency in the expressions between the Chinese and the English texts, we propose to delay our examination and finalization until after the meetings later this year or next year when the English texts are finalized.

United Nations A/CN.9/609/Add.2

General Assembly

Distr.: General
10 May 2006*

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Compilation of comments by Governments and international organizations

Addendum

Contents

		Page
II.	Comments received from Member States and international organizations	2
	A. Member States	2
	3. Germany	2

* Submission of this note was delayed because of its late receipt.

V.06-53970 (E) 300506 300506

II. Comments received from Member States and international organizations

A. Member States

3. Germany

[Original: English]

[8 May 2006]

The German Government would like to express its thanks for the excellent Draft. Our comments are as follows:

1. Interim measures, article 17 et seq.

The German Government welcomes the Draft of article 17 et seq. now put forward. We therefore do not intend to make any suggestions regarding changes.

2. Written form requirement, article 7

The German Government favours the alternative proposal, which does not contain any provisions concerning the form of the communication. It is above all actual circumstances in practice which speak for this solution, since such agreements are often not set out in writing.

Further, the "warning function" of the written form will probably have become obsolete by now since arbitration is viewed as equal to national jurisdiction. As, in addition, the first solution also provides for the possibility of setting the agreement out in writing in retrospect, the written form can no longer be seen as having a warning function; both models thus produce the same result. The fact that the written form can be used as evidence merely has practical implications for the presentation of evidence and, as a result, also justifies omitting any form requirements. It was, not least, statements by those delegations who already have freedom of form and who unanimously reported only positive experience which were convincing.

3. Relationship to article II (2) of the New York Convention

The declaration on article II (2) of the New York Convention is to be welcomed as an interim solution. However, a revision of the New York Convention should be seriously considered for the future. This may involve a great deal of work, but the result should be favoured on account of its higher degree of legal certainty. If the New York Convention itself is not amended, this will merely lead to the mitigation of resulting problems caused by legal instruments such as the proposed declaration. The problem itself will remain, nonetheless. Against this background, an attempt should be made to tackle this problem, too.

United Nations A/CN.9/609/Add.3

General Assembly

Distr.: General
12 May 2006*

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Compilation of comments by Governments and international organizations

Addendum

Contents

		Page
II.	Comments received from Member States and international organizations	2
A.	Member States	2
4.	Belgium	2

* Submission of this note was delayed because of its late receipt.

V.06-54056 (E) 260506 260506

II. Comments received from Member States and international organizations

A. Member States

4. Belgium

[Original: French]
[12 May 2006]

These comments are limited to the draft legislative provisions on the written form of the arbitration agreement and to the draft declaration regarding the interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

1. As regards the draft legislative provisions on the written form of the arbitration agreement, three comments may be made.

1.1. The first relates to the fact that these draft legislative provisions set out two different proposals for revising Article 7 of the Model Law on International Commercial Arbitration and that it seems to be envisaged that these two proposals could be approved simultaneously by the Commission.

However, these two proposals would appear to be irreconcilable as the first one aims to soften the requirement in Article 7 that the arbitration agreement be in writing, whereas the second one aims to suppress it.

Belgium therefore considers that a choice should be made and that the first proposal, which aims to soften the requirement, is preferable.

The requirement that the arbitration agreement be in writing is a legitimate requirement given the impact of the agreement on the basic right of access to the courts. While it is reasonable to soften this requirement and thereby adapt it to the needs of international trade, Belgium considers that simply suppressing it would be excessive.

1.2. The second comment relates to the content of the first aforementioned proposal for revising Article 7 of the Model Law, and particularly to the formulation of its paragraph 3.

Belgium believes that this provision should not be interpreted in the sense that a written document which has nothing at all to do with the parties, such as a copy of the rules of an arbitration body, could be considered to constitute an arbitration agreement in written form.

On the contrary, paragraph 3 of Article 7 should be interpreted in the sense that, on the one hand, in all cases there must be a written document emanating from at least one of the parties, such as a written proposal, even in a simplified form, to conclude an arbitration agreement, but that, on the other hand, there is no need for the finalization of the contractual process to be documented as such by a contract "in due form", since it will be possible to prove its finalization on the basis of the existing written document.

An explanatory comment should make this point clearer.

1.3. Further to the preceding comment, Belgium wishes to make it clear that it is not in favour of the modification to Article 35.2 of the Model Law proposed with a view to suppressing the requirement that the party calling for the enforcement of an arbitral award must supply the original of the arbitration agreement.

Such a modification would create an undesirable disparity between the Model Law and the New York Convention.

2. As regards the draft declaration relating to the interpretation of the New York Convention, it would seem reasonable to consider that the purpose of this interpretative declaration is to establish a link between the proposed modifications to Article 7 of the Model Law and the New York Convention.

Belgium therefore considers that, if the revision of Article 7 of the Model Law aims to soften the requirement in this article that the arbitration agreement be in writing (see point 1.1 above), the purpose of the interpretative declaration should be to recommend that account be taken of such softening in interpretations of the same writing requirement formulated in Article II of the New York Convention.

Belgium therefore questions the appropriateness of including in the declaration a reference to Article VII of the New York Convention, since recourse to this article in the present context presupposes the disregarding of Article II of the Convention.

United Nations A/CN.9/609/Add.4

General Assembly

Distr.: General
18 May 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Note by the Secretariat*

Addendum

Contents

		Page
II.	Comments received from Member States and international organizations	2
A.	Member States	2
5.	United Kingdom	2

* The late submission of the document reflects the date on which the proposals were communicated to the Secretariat.

V.06-54200 (E) 060606 060606

II. Comments received from Member States and international organizations

A. Member States

5. United Kingdom

[Original: English]
[18 May 2006]

United Kingdom comments on Article 17 of the Model Law and the future work of UNCITRAL

Following the last meeting of the Working Group in New York, we agreed to send comments on the work of UNCITRAL, in light of its recent project on interim measures and in particular "preliminary orders".

As we noted at the meeting, the United Kingdom has mixed feelings about the completion of this project.

On the one hand, we are of course happy that the Working Group has finally arrived at an agreed draft, which can go forward to the Commission next month, leaving the way clear, at last, for new projects. We would particularly like to congratulate the Chairman and the Secretariat for the tireless work and drafting skills in arriving at a final solution after many difficult sessions.

On the other hand, however, it is the nature of this process itself that gives rise to serious concerns—quite apart from the United Kingdom's reservations on the substance of the new provision (which are now a matter of record, and need not be restated).

On any view, the Working Group's draft on "preliminary orders" has been the subject of extraordinary controversy inside and (more troublingly) outside UNCITRAL. Even ahead of the Commission's consideration, it is already apparent that the new provision will be met with a substantial body of criticism in the international field. This is not to say that it does not also have a body of support, but the key question for us is whether this is really a position in which UNCITRAL should ever find itself. We cannot think of any previous project (short of the Model Law itself) that has had such a difficult gestation, and required so many resources for what, so far as "preliminary orders" are concerned, may be considered a somewhat modest result.

Early on in this particular project, it became manifest that there was no international consensus on "*ex parte*" measures. On the contrary there was—and remains—profound disagreement amongst specialists. The result was inevitable: lengthy debates; difficult Working Group sessions; and a final draft that has the weaknesses of any hard fought compromise.

Our fear, which we have expressed previously, is that the end result may damage UNCITRAL's international standing and future influence. UNCITRAL has a unique reputation worldwide in the development of commercial law. In our view, a key element in its success has been its acceptance as a neutral and expert body, able to express an international consensus, and therefore of significant influence across

diverse cultures and legal traditions. It has been and should be a source of innovation, but within careful bounds. As soon as its work is perceived as controversial, or a vehicle for the interests of a few dominant delegations, it may lose this standing. Equally, as soon as its processes are seen as inefficient in terms of cost and time, it may be that much harder to attract and maintain international participation.

This is all the more regrettable in this case, given that the relatively minor "*ex parte*" element of our work has been allowed to overshadow the rest of the project, and what is certainly a commendable draft on "*inter partes*" measures.

Our suggestion is that this experience be borne in mind in structuring UNCITRAL's future work. In particular, it is our hope that UNCITRAL will continue to innovate, and to push the international consensus as far as it will go. At the same time, however, it is vital that UNCITRAL avoids "trouble spots", internal division, and the expenditure of disproportionate resources where this is avoidable.

The United Kingdom strongly supports the work of UNCITRAL, and will continue to do so. We hope that these few observations will be understood, as they are intended, as constructive comments, and we look forward to working closely with UNCITRAL in its future work in this area.

United Nations A/CN.9/609/Add.5

General Assembly

Distr.: General
30 May 2006*

Original: English/French

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement – Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Addendum

Contents

		Page
II.	Comments received from Member States and international organizations	2
	A. Member States	2
	6. France	2

* Submission of this note was delayed because of its late receipt.

V.06-54426 (E) 200606 210606

II. Comments received from Member States and international organizations

A. Member States

4. France

[Original: French]
[29 May 2006]

General remarks

1. The French delegation notes with regret that the Working Group's method of functioning did not fully meet its expectations. It felt that, on numerous occasions, every effort had not been made to reach truly consensus solutions. For example, the Working Group unfortunately did not take into account the reservations expressed—by a majority at the last plenary session—regarding "preliminary orders" and preferred to make no amendments whatsoever to the provisions drafted on this issue. Also, it adopted a provision on "anti-suit injunctions" despite the reservations expressed by many delegations. The reports of the Working Group are sometimes elliptical on these matters and do not sufficiently make the point that a compromise could be achieved only under particularly difficult conditions.

2. As to substance, the French delegation gives a mixed appraisal of the work of the Working Group, in which it nonetheless participated positively and constructively. While the definitions of interim measures that can be ordered by an international arbitrator are generally welcome, many provisions are overly cumbersome—as a comparison with the original provisions of the Model Law reveals—if not questionable from the perspective of arbitration practice.

3.From the viewpoint of France, all of this compromises the quality and desired universal scope of the new model legislative provisions. A symposium held last February at the Senate in Paris on the UNCITRAL project showed that for a good many French legal writers and arbitration practitioners the model provisions gave rise to numerous, strong reservations, which are largely in line with those formulated by the French delegation during the course of the work.

Interim measures of protection

Draft article 17 (2) (b): anti-suit injunctions

4. The French delegation is opposed to the inclusion of "anti-suit" measures among ordinary interim measures. Measures of this type do not fall into the category of interim measures. Also, they are alien to the continental law tradition. Anti-suit injunctions are questionable since they deny a party the legal remedies to which it is normally entitled. Hence such a course of action is challengeable within the European Union.[1]

[1] See, on this point, the judgement of the European Court of Justice of 27 April 2004 in Case C-159/02 (Turner), which ruled that the Brussels Convention precludes "*the grant of an injunction whereby a court of a contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting State*".

5. The French delegation wishes to request the deletion of this provision, which was inserted in the revised provisions without any extensive discussion of the potential consequences on the structure of the provisions as a whole (cf. point 1 above).

Draft article 17 ter: preliminary orders

6. A large group of countries shared the French delegation's major objections to such measures, believing that they ran counter to party autonomy, the foundation of international commercial arbitration. These measures might also infringe the principle of equal treatment of parties. The French delegation thus proposes once again—this suggestion having received the support of many delegations at the previous session—that such measures be permitted only if they have previously been accepted by the parties in their arbitration agreement. This positive option would not in any way preclude the possibility of the effective use of these measures since it could be inserted in a model arbitration agreement to which the parties may refer for the settlement of their disputes. It therefore constitutes a genuine compromise arrangement which could make acceptable the introduction in arbitration law of ex parte measures which have been accepted in the form of preliminary orders.

Draft article 17 quater, paragraph (4): unenforceable nature of preliminary orders

7. Somewhat illogically, given the Working Group's interest in this innovative extension of the arbitrator's powers, it has been stipulated that "[a] preliminary order shall be binding on the parties but shall not be subject to enforcement by a court". This would rob these measures of much of their effectiveness since juridical persons, in particular banking establishments, which the arbitrator will approach to obtain the execution of such orders, would be unable to comply without a writ of enforcement. It would therefore be desirable to delete that sentence while retaining the following one, which states that a preliminary order does not constitute an award.

Draft article 17 decies: grounds for refusing recognition/enforcement

8. The French delegation can only reiterate its position on this matter. The proposed text, which combines provisions based on the New York Convention and relating to arbitral awards with provisions stemming more specifically from requirements concerning interim measures, constitutes a set of clauses incorporating excessive and disproportionate double conditions.[2]

---

[2] It is recalled that the French delegation had proposed a more concise wording:
(1) An interim measure of protection issued by an arbitral tribunal shall be recognized as binding on the parties and [unless otherwise provided by the arbitral tribunal] enforced upon application by the party which obtained it [or by the arbitral tribunal] to the competent court, irrespective of the country in which it was issued.
(2) The court may refuse to recognize [and] [or] enforce an interim measure of protection only if:
(a) Upon the request of a party the court is satisfied that:
- That party was not given notice of the appointment of an arbitrator or of the arbitral proceedings;

Written form of arbitration agreement

9. The French delegation agrees with the substance of the draft provisions prepared by the Working Group. However, it proposes that their wording be more succinct. In particular, the revised draft article 7 contains a paragraph (4) on electronic communication, which could be deleted or abridged since it constitutes a definition and not a prescriptive rule. Reference might simply be made to UNICTRAL documents dealing with electronic commerce.

10. Surprisingly, the omission of the writing requirement has also been proposed as an alternative. The French delegation does not wish this other arrangement to appear in the revised provisions. It would greatly weaken the provisions adopted by the Working Group with a view to embracing as closely as possible the current situation regarding arbitration law on this matter. In general, it is desirable to make as limited use as possible of variants, the aim being to guide States towards solutions that appear the most appropriate. Most importantly, the proposal to totally remove the requirement of written form had not received the Working Group's agreement.

- The party against whom the measure is directed was unable to present its case under the conditions of article 17;
- The arbitral tribunal did not have [was deprived of] the powers to order any such interim measure of protection;

(b) The court finds that:

- The requested measure is incompatible with the powers conferred upon the court by its laws unless the interim measure can be reformulated to adapt it to those laws;
- The recognition or enforcement of the interim measure would be contrary to the public policy recognized by the court.

United Nations A/CN.9/609/Add.6

General Assembly

Distr.: General
19 June 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Draft legislative provisions on interim measures and the form of arbitration agreement—Draft declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Comments received from Member States and international organizations

Note by the Secretariat*

Addendum

Contents

		Page
II.	Comments received from Member States and international organizations	2
A.	Member States	2
	Austria	2

* The late submission of the document reflects the date on which the proposals were received by the Secretariat.

V.06-54967 (E) 210606 210606

II. Comments received from Member States and international organizations

A. Member States

Austria

[Original: English]
[6 April 2006]

Comments on draft legislative provisions on interim measures and on the form requirement for arbitration agreements

The Austrian Ministry of Justice thanks UNCITRAL for giving it the opportunity to comment on the draft text which was so meritoriously developed by the Secretariat taking into consideration the discussion of Working Group II at its forty-fourth session in New York. As requested by the Secretary-General our comment will be straight to the point and very concise.

In general Austria can go along with the draft text as it currently stands and avails itself of this opportunity to congratulate the secretariat for its excellent work in the course of and in between the Working Group meetings related to this topic.

There are, however, two elements in the draft text Austria is not really content with:

First, Austria would like to reiterate its position that it is neither desirable nor appropriate to confer on arbitral tribunals the power to grant preliminary orders on an ex parte basis. The party against which an interim measure is invoked should always be given the possibility to present its position prior to the issuance of such a measure.

Therefore, Austria remains critical of draft article 17 ter of the Model Law even taking into account the specific precautions set out by article 17 quater, in particular paragraph 5 of this article. The opt-out solution in article 17 ter (1) seems to be not sufficient to protect the rights of the parties. As a rule parties to an arbitration agreement might not be aware of the danger of being later faced by a preliminary order directed against them and might therefore not be prepared to opt-out via a respective clause in their arbitration agreement.

Secondly, as Austria already pointed out during the meetings of the Working Group, this delegation is highly sceptical as to the exposure of the form requirement laid down in article 7 of the Model Law and therefore strongly opposed to the idea that an arbitration agreement could validly be concluded orally or even by mere conduct of the persons involved. Austria proposes to stick to the current wording of article 7 of the Model Law as neither of the two variants for a revised article 7 is able to meet our concerns and there is, in our view, no urgent need for abandoning the current requirements laid down in article 7 as it currently stands.

United Nations A/CN.9/610

General Assembly

Distr.: General
5 April 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Settlement of commercial disputes

Possible future work in the field of settlement of commercial disputes

Note by the Secretariat

Contents

		Paragraphs	Page
Introduction		1-5	2
I.	List of topics initially mentioned as possible future work	6-10	3
	1. List of topics considered by the Commission	6	3
	2. Other topics mentioned	7	4
	3. Topics proposed by arbitration experts	8-9	5
	4. Conclusion by the Commission	10	6
II.	Topics most recently mentioned as possible future work	11-19	6
	1. UNCITRAL Arbitration Rules	12	6
	2. Arbitrability	13	7
	3. On-line dispute resolution	14	7
	4. Sovereign immunity	15	7
	5. Other topics	16-19	7

V.06-52616 (E) 260406 260406

Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.[1]

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN 9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) ("the Arbitration Model Law"), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[2]

3. After concluding the discussion on its future work in the area of international commercial arbitration, the Commission entrusted the work to one of its working groups, which it established as Working Group II (Arbitration and Conciliation), and decided that the priority items for the Working Group should be conciliation,[3] requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the Arbitration Model Law and article II, paragraph (2), of the New York Convention ("the writing requirement"),[4] enforceability of interim measures of protection[5] and possible enforceability of an award that had been set aside in the State of origin.[6]

4. Work on the UNCITRAL Model Law on International Commercial Conciliation was completed by the Working Group at its thirty-fifth session in 2001, and work in relation to both the question of interim measures and the form requirement for arbitration agreements was completed at the forty-fourth session of the Working Group in 2006.

5. To facilitate discussions of the Commission on topics to be considered in priority by the Working Group, this note contains a list of topics, which were discussed at previous sessions of the Commission and suggestions made in the Working Group.

I. List of topics initially mentioned as possible future work

1. List of topics considered by the Commission

6. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission considered possible topics for future work.[7] The list of those topics, excluding conciliation and the requirement that an arbitration agreement be in writing was as follows:

(a) Arbitrability:[8] it was observed that uncertainties as to whether the subject matters of certain disputes are capable of settlement by arbitration caused problems in international commercial arbitration. To the extent that the issue should be considered, the purpose should not be to strive for uniformity, but to stimulate transparency of solutions on that question. Work might be geared, for example, towards formulating a uniform provision setting out three or four issues that were generally considered non-arbitrable and calling upon States to list any other issues that are regarded as non-arbitrable by the State. At the same time, concerns were expressed that any national listing of non-arbitrable issues might be inflexible and therefore counter-productive. It was said that the question of arbitrability was subject to constant development (including through case law) and that some States might find it undesirable to interfere with that development (see below, para. 13).

(b) Sovereign immunity:[9] support was expressed in favour of preparatory work by the Secretariat of that item on the basis that it was of significant practical importance. That matter was noted as causing uncertainty and, potentially, delay in a number of States (see below, para. 15).

(c) Consolidation of cases before arbitral tribunals:[10] it was pointed out that consolidation of arbitration cases into a single proceeding was not a novel issue and that it had practical significance in international arbitration, in particular where a number of interrelated contracts or a chain of contracts were entered into. It was also suggested that it might be useful for the Commission to prepare guidelines to assist parties in drafting arbitration agreements that envisaged consolidation of proceedings.

(d) Confidentiality of information in arbitral proceedings:[11] it was explained that parties involved in arbitral proceedings were becoming increasingly concerned over the absence of any rule in respect of confidentiality.

(e) Raising claims for the purpose of set-off:[12] views were expressed that it was generally well accepted that an arbitral tribunal could only take-up a claim if that claim was covered by the arbitration agreement. It was decided that the consideration of the matter was therefore unlikely to be productive.

(f) Decisions by "truncated" arbitral tribunals:[13] it was felt that it would be inadvisable to attempt to legislate on this matter because it raised sensitive issues, had implications in the context of recognition and enforcement of an award made by a truncated tribunal, and acceptable solutions would be difficult to achieve.

(g) Liability of arbitrators:[14] it was said that there were many countries that did not have legislation on this matter, and it would be valuable if the Commission would provide model solutions. Another view was that, in light of different approaches in legal systems, the matter should not be considered by the

Commission because it was unlikely that a consensus could be achieved on a workable solution.

(h) Power of the arbitral tribunal to award interest:[15] it was noted that the power of an arbitral tribunal to award interest was a matter of great practical importance that arose often and potentially involved large amounts of money. It was suggested that providing guidance and model solutions would facilitate arbitration.

(i) Costs of arbitral proceedings:[16] it was widely considered that the question of various matters relating to the costs of arbitration was not urgent.

(j) Possible enforceability of an award that has been set aside in the State of origin:[17] the view was expressed that this issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[18] It was suggested, however, that that item involved a broader spectrum of issues, such as, the question of the discretionary power to enforce an award even where a ground for refusal existed (such as a minor procedural defect or a defect that did not influence the outcome of the arbitration).

2. Other topics mentioned

7. At its thirty-second session (Vienna, 17 May-4 June 1999), the following topics were mentioned as potentially worthy of being taken up by the Commission at an appropriate future time:[19]

(a) Gaps in contracts left by the parties and filling of those gaps by a third person or an arbitral tribunal on the basis of an authorization of the parties.

(b) Changed circumstances after the conclusion of a contract and the possibility that the parties entrusted a third person or an arbitral tribunal with the adaptation of the contract to changed circumstances.

(c) Freedom of parties to be represented in arbitral proceedings by persons of their choice and the issue of limits to that freedom based on, for example, nationality or membership in a professional association.

(d) Questions relating to the interpretation of legislative provisions such as those in article II (3) of the New York Convention (or article 8 (1) of the Arbitration Model Law), which in practice led to divergent results, in particular the question of the court's terms of reference (i) in deciding whether to refer the parties to arbitration, (ii) in considering whether the arbitration agreement was null and void, inoperative or incapable of being performed, and (iii) where the defendant invoked the fact that an arbitration proceeding was pending or that an arbitral award had been issued.

(e) Questions relating to cases where a foreign court judgement was presented with a request for its recognition or enforcement, but where the respondent, by way of defence, invoked (i) the existence of an arbitration agreement, or (ii) the fact that an arbitration proceeding was pending, or (iii) the fact that an arbitral award had been issued in the same matter. Those instances were often not addressed by treaties dealing with recognition and enforcement of foreign court judgements. Difficulties arose in particular where the applicable treaty was designed to facilitate recognition and enforcement of court judgements, but the treaty itself did not allow recognition or enforcement to be refused on the ground

that the dispute dealt with by the judgement was covered by an arbitration agreement, was being considered in a pending arbitral proceeding, or was the subject matter of an arbitral award.

3. Topics proposed by arbitration experts

8. A number of other topics concerning the New York Convention, proposed by arbitration experts at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the New York Convention, were raised for possible consideration by the Working Group at its thirty-second session (Vienna, 20-31 March 2000).[20] These included:

(a) The meaning and effect of a non-domestic award, that is an award not considered as a domestic award in the State where its recognition and enforcement was sought (article I (1), second sentence).

(b) Clarification of what constituted an arbitral award under the Convention. Did it cover, for example, awards on agreed terms; "Treaty awards"; a-national awards; award-like decisions in proceedings akin to arbitration, such as *arbitrato irrituale*.

(c) Determination of the law applicable to arbitrability under article II (1).

(d) Field of application of article II (3) concerning the enforcement of the arbitration agreement.

(e) Law applicable to agreements that might be "null and void, inoperative, or incapable of being performed" under article II (3).

(f) Compatibility of court-ordered interim measures with arbitration agreements falling under the Convention.

(g) Enforcement conditions and procedure referred to in article III, as implementing legislation showed diverging solutions.

(h) Period of limitation for enforcement of a Convention award where again implementing legislation showed a range of different periods.

(i) Residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V.

(j) Meaning and effect of the suspension of an arbitral award in the country of origin (article V (i)(e)).

(k) Meaning and effect of the more-favourable-law provision of article VII (1).

9. Recalling the discussion of increased use of electronic commerce and the question whether electronic messages complied with formal requirements for arbitration agreements, the Commission took note of suggestions that it would be useful to review the implications of "on-line" arbitrations, i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communications. It was also agreed that the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce on that matter (see below, paragraph 14).[21]

4. Conclusion by the Commission

10. When the Commission discussed its future work at its thirty-second session (Vienna, 17 May-4 June 1999), it left open the question of what form that future work might take. It was agreed that decisions on that matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).[22] At its thirty-third session (New York, 12 June-7 July 2000), the Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-law provision of article VII (1) of the 1958 New York Convention; raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims; freedom of parties to be represented in arbitral proceedings by persons of their choice; residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention; and the power by the arbitral tribunal to award interest.[23]

II. Topics most recently mentioned as possible future work

11. The following topics were mentioned, either by the Commission or the Working Group, as possible future topics to be considered by the Working Group in priority.

1. UNCITRAL Arbitration Rules

12. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth sessions (Vienna, 4-15 July 2005), the Commission heard proposals that a revision of the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) could be considered for inclusion in future work.[24] Although reservations were expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority. It was suggested that, given the wide use of the UNCITRAL Arbitration Rules, any necessary revision would be of positive benefit to practitioners in international arbitration. The view was expressed that particular caution should be exercised in determining the scope of such a revision, which should be precisely defined in order to avoid undermining the stability of the reference offered by the UNCITRAL Arbitration Rules over 30 years of existence of that instrument. It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be undertaken with practitioners to develop a list of topics on which updating or revision was necessary. The view was also expressed that preliminary consideration of a possible revision of the Rules should not prevent the

Working Group from envisaging other possible topics for future work, such as the use of arbitration in corporate governance or the use of on-line dispute resolution mechanisms.

2. Arbitrability

13. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth (Vienna, 4-15 July 2005) sessions, the Commission noted that priority consideration might be given to the issue of arbitrability of intra-corporate disputes and other issues relating to arbitrability, for example, arbitrability in the fields of immovable property, insolvency or unfair competition (see above, para. 6).[25]

3. On-line dispute resolution (ODR)

14. The Commission took note of a proposal that priority consideration might be given to the issues of on-line dispute resolution (see above, para. 9).[26]

4. Sovereign immunity

15. On the question of sovereign immunity, the Working Group noted at its forty-fourth session (New York, 23-27 January 2006) that, in December 2004, the General Assembly adopted the Jurisdictional Immunities Convention (see resolution A/RES/59/38). The Working Group was invited to consider whether, taking account of the application of that Convention to the immunity of a State and its property from the jurisdiction of the courts of another State, the question of immunity was a matter that needed to be addressed in the context of arbitration from the perspective of an agreement by the State to participate in arbitration and the enforcement of arbitral awards against a State. Concern was expressed that the topic of sovereign immunity should be limited to the point of enforcement and that work on that topic in the area of arbitration could create confusion. Nonetheless, support was expressed for work to be undertaken on that topic, particularly noting that there was growing case law where States that participated in investment arbitrations failed to comply with arbitral awards. It was also cautioned that the topic of sovereign immunity raised questions of public policy, which did not easily lend itself to harmonisation (see above, para. 6).[27]

5. Other topics

16. Another possible topic suggested for consideration to the Working Group at its forty-fourth session (New York, 23-27 January 2006) was the revision of article 27 of the Arbitration Model Law, which currently permitted an arbitral tribunal or a party to request a court to assist in the taking of evidence in an arbitration but allowed the court to execute that request "within its competence and according to its rules on taking evidence". It was suggested that article 27 could be revised to oblige a court to render such assistance.[28]

17. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration by appropriately amending the Arbitration Model Law. It was observed that those injunctions were impacting negatively on international arbitration and increased both the cost and complexity thereof.

18. In addition, it was suggested that the Working Group could consider the impact of arbitration on third parties as well as multi-party arbitrations. Whilst the Working Group agreed that an arbitral tribunal had no jurisdiction to bind parties that were not party to the arbitration agreement, it noted that that matter was of particular importance in the context of granting of preliminary orders. It was highlighted that there had been developments, for example, in a case involving investment arbitration where standing had been given to third parties that might be affected by a decision of the arbitral tribunal. The Working Group agreed that these matters could be considered as items for future work by the Working Group.[29]

19. A broader suggestion was made that UNCITRAL should not confine itself to a piecemeal approach to individual issues but work instead on the preparation of an international binding instrument on international commercial arbitration, bearing in mind previous instruments such as the 1961 European Convention on International Commercial Arbitration and other similar texts. It was suggested that work on such a project should not seek to revise arbitration regimes that worked well in practice such as the New York Convention. While interest was expressed in such a larger project, the Working Group was cautioned not to include in its work programme unnecessarily time-consuming projects, and to focus on issues of practical interest to the arbitration community.[30]

Notes

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[2] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[3] Ibid., paras. 340-343 and para. 380.

[4] Ibid., paras. 344-350 and para. 380.

[5] Ibid., paras. 371-373 and para. 380.

[6] Ibid., paras. 374-376 and para. 380.

[7] Ibid., paras 340-380; A/CN.9/WG.II/WP.108, para. 6; A/CN.9/468, para. 107.

[8] A/CN.9/460, paras. 32-34 and *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 351-353.

[9] Ibid., paras. 35-50 and ibid., paras. 354-355.

[10] Ibid., paras. 51-61 and ibid., paras. 356-357.

[11] Ibid., paras. 62-71 and ibid., paras. 358-359.

[12] Ibid., paras. 72-79 and ibid., paras. 360-361.

[13] Ibid., paras. 80-91 and ibid., paras. 362-363.

[14] Ibid., paras. 92-100 and ibid., paras. 364-366.

[15] Ibid., paras. 101-106 and ibid., paras. 367-369.

[16] Ibid., paras. 107-114 and ibid., para. 370.

[17] Ibid., paras. 128-144 and ibid., paras. 374-376.

[18] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

[19] Ibid., *Fifty-fourth session, Supplement No. 17* (A/54/17), para. 339; A/CN.9/468, para. 108.

[20] A/CN.9/468, para. 109.

[21] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396; A/CN.9/468, para 113.

[22] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 338.

[23] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.

[24] Ibid., *Fifty-eighth Session, Supplement No. 17 (A/58/17), para. 204; ibid., Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; ibid., Sixtieth Session, Supplement No. 17 (A/60/17), para. 178; A/CN.9/573, para. 100; A/CN.9/592, paras. 90 and 93.

[25] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204; *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; Sixtieth Session, Supplement No. 17 (A/60/17), para. 178; A/CN.9/573, para. 100, A/CN.9/592, paras. 90.

[26] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; *Sixtieth Session, Supplement No. 17* (A/60/17), para. 178; A/CN.9/573, para. 100; A/CN.9/592, para. 90.

[27] A/CN.9/592, paras. 90 and 92.

[28] A/CN.9/592, para. 94.

[29] A/CN.9/592, para. 94.

[30] A/CN.9/592, para. 91.

United Nations A/CN.9/610/Corr.1

General Assembly

Distr.: General
2 May 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Settlement of commercial disputes

Possible future work in the field of settlement of commercial disputes

Note by the Secretariat

Corner notation

The corner notation should read as above.

V.06-53666 (E) 030506 030506

United Nations A/CN.9/610/Add.1

General Assembly

Distr.: General
3 April 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Settlement of commercial disputes

Possible future work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

Contents

	Paragraphs	Page
Introduction	1-2	2
Suggestions for a revision of the UNCITRAL Arbitration Rules	3-13	2
Multiparty arbitration	3	2
Consolidation of cases before arbitral tribunals	4	2
Truncated arbitral tribunals and obstructing arbitrators	5	3
Confidentiality of information in arbitral proceedings	6	3
Interim measures	7	3
Liability of arbitrators	8	3
Raising claims for the purpose of set-off	9	3
Third-party intervention in arbitral proceedings	10	4
Other suggestions	11-13	4

V.06-53791 (E) 260506 260506

Introduction

1. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth sessions (Vienna, 4-15 July 2005), the Commission heard proposals that a revision of the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) ("the UNCITRAL Notes") could be considered for inclusion in future work.[1] At the forty-fourth session of the Working Group (New York, 23-27 January 2006), although reservations were expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority.[2] It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be undertaken with practitioners to develop a list of topics on which updating or revision was necessary.[3]

2. At its thirty-eighth session (Vienna, 4-15 July 2005), the Commission was informed that 2006 would mark the thirtieth anniversary of the UNCITRAL Arbitration Rules and that conferences to celebrate that anniversary were expected to be organized in different regions to exchange information on the application and possible areas of revision of the UNCITRAL Arbitration Rules.[4] A conference was held in Vienna on 6 and 7 April 2006 in cooperation with the International Arbitral Centre of the Austrian Federal Economic Chamber. Suggestions were made to amend a number of articles of the UNCITRAL Arbitration Rules in order to better align the Rules with current international arbitration practice and the relevant provisions of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). To facilitate discussions of the Commission on that topic, this note contains a brief overview of some suggestions made by practitioners during that conference. Such an overview shall not be regarded as an exhaustive list of topics to be considered by the Commission. Should the Commission decide that a revision of the UNCITRAL Arbitration Rules should be considered by Working Group II (Arbitration), a more detailed annotated list of possible areas of revision could be presented by the Secretariat to the Working Group at its next session to assist it in considering the areas of possible revision and the policies to be adopted in revising the Rules.

Suggestions for a revision of the UNCITRAL Arbitration Rules

Multiparty arbitration

3. When a single arbitration involves more than two parties (multi-party arbitration), proceedings can be more complicated to manage and rules of various arbitration institutions have been amended so as to accommodate multi-party arbitration.[5] Amendments to the UNCITRAL Arbitration Rules could be considered to address that situation. The areas of possibly increased complexity in multi-party arbitration are listed in the UNCITRAL Notes.[6]

Consolidation of cases before arbitral tribunals

4. In situations where several distinct disputes arise between the same parties under separate contracts (e.g., related contracts or a chain of contracts) containing

separate arbitration clauses, one of the parties might refuse that all such disputes be resolved in the same proceedings. A party might also initiate a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage. Consolidation in such situations might provide a more efficient resolution of the disputes between the parties and also reduce the possibility of inconsistent awards in parallel arbitrations. Under the UNCITRAL Arbitration Rules, consolidation is possible only where the parties specifically so agree.[7]

Truncated arbitral tribunals and obstructing arbitrators

5. A review of the UNCITRAL Arbitration Rules might address the situation where the arbitral tribunal decides to proceed with the arbitration notwithstanding the absence in bad faith of one of its members or where the arbitral tribunal considers that one of its members is obstructing the progress of the case, including the arbitral tribunal's deliberations.[8] The Commission might wish to discuss the potential detrimental consequences of bad-faith withdrawals of arbitrators from arbitral proceedings on the practice of international commercial arbitration and, in that context, consider the extent to which the parties should be able, by agreement, to put beyond doubt the validity of an award issued by a truncated arbitral tribunal.[9]

Confidentiality of information in arbitral proceedings

6. Articles 25, paragraph (4), and 32, paragraph (5), of the UNCITRAL Arbitration Rules deal with the confidentiality of hearings and awards respectively, but there are no rules regarding the confidentiality of the proceedings as such, or of the materials (including pleadings) before the arbitral tribunal. A suggestion was made that an explicit provision to that effect be included in a revised version of the UNCITRAL Arbitration Rules.

Interim measures

7. Article 26 of the UNCITRAL Arbitration Rules, which deals with interim measures is not consistent with the revised model legislative provisions on interim measures proposed to be inserted under a new chapter IV bis of the Model Law and scheduled for adoption by the Commission at its thirty-ninth session.[10] The question to be considered is whether, and if so, to what extent, article 26 should mirror the revised legislative provisions on interim measures of the Model Law.

Liability of arbitrators

8. The Commission might wish to consider whether the question of liability of arbitrators needs to be further examined in the context of the UNCITRAL Arbitration Rules. At present, neither the UNCITRAL Arbitration Rules or the Model Law address that question.[11]

Raising claims for the purpose of set-off

9. The UNCITRAL Arbitration Rules provide that the respondent may rely on a claim for the purpose of a set-off if the claim arises out of the same contract (article 19). Views have been expressed that the arbitral tribunal's competence to consider claims by way of a set-off should, under certain conditions, extend beyond

the contract from which the principal claim arises. The reasons cited are procedural efficiency and the desirability of eliminating disputes between the parties.[12]

Third-party intervention in arbitral proceedings

10. Third parties, for example non-governmental organizations, often ask for an opportunity to explain their positions, particularly in investment treaty arbitrations. Article 15, paragraph (1), of the UNCITRAL Arbitration Rules, providing that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate", could be interpreted as conferring power on the arbitral tribunal to accept *amicus curiae* briefs in written form. The Commission might wish to consider whether an express provision on third-party intervention should be included in any revised version of the UNCITRAL Arbitration Rules.

Other suggestions

11. Article 3 of the UNCITRAL Arbitration Rules requires the claimant's notice of arbitration to indicate the "general nature" of its claim as well as the "remedy or relief sought". Thereafter, the arbitral tribunal is constituted without the respondent having an opportunity (or being required) to state its position with respect to (i) jurisdiction, (ii) the claim, or (iii) any counterclaim. In order to promote a more streamlined efficient arbitral procedure, article 3 might be modified to include provision permitting the respondent to submit a response to the claimant's notice of arbitration.

12. Article 35 of the UNCITRAL Arbitration Rules currently provides that either party might request the arbitral tribunal to give an interpretation of the award. The question raised was whether that provision should only apply where there is a dispute as to what the award orders the parties to do.

13. Article 39, paragraph (1), of the UNCITRAL Arbitration Rules provides that fees be "reasonable in amount". The Commission might wish to consider whether more guidance on that question should be included in any revision of the UNCITRAL Arbitration Rules.

Notes

[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 178; A/CN.9/573, para. 100; A/CN.9/592, paras. 90 and 93.

[2] A/CN.9/592, para. 93.

[3] Ibid.

[4] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 179.

[5] For instance, the ICC Rules (article 10), the LCIA Rules (article 8.1), and the WIPO Rules (article 18).

[6] UNCITRAL Notes on Organizing Arbitral Proceedings, paras. 86-88.

[7] Article 19 (3) of the UNCITRAL Arbitration Rules states that the respondent can bring a counter claim arising out of the same contract.

[8] In that respect, article 13 of the UNCITRAL Arbitration Rules deals with substitute arbitrators; and article 32, paragraph (4), of the UNCITRAL Arbitration Rules requires the majority of the tribunal to state the reasons for the absence of one arbitrator's signature from an award.

[9] A/CN.9/460, paras. 80-91.

[10] A/CN.9/592, annex I.

[11] A/CN.9/460, paras 92-100.

[12] A/CN.9/460, paras. 72-79.